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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 51

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

KENTUCKY UTILITIES COMPANY [1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY

OPINIONS BELOW

The majority and dissenting opinions in the court of appeals are reported at 375 F. 2d 403. The opinion of the district court is reported at 237 F. Supp. 502.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1966. The petition of the Tennessee Valley Authority for a writ of certiorari was filed on February 13, 1967, and was granted on March 27, 1967 (386 U.S. 980; R. 750). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

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[1] Together with No. 40 (*Hardin, Mayor of Tazewell, et al.* v. *Kentucky Utilities Co.*) and No. 50 (*Powell Valley Electric Cooperative* v. *Kentucky Utilities Co.*).

QUESTIONS PRESENTED

A private utility was the principal supplier of electric service within the corporate limits of Tazewell and New Tazewell, two small municipalities in Claiborne County, Tennessee, but distributors of TVA power supplied two-thirds of the electric service within the county, and the lines and service of one of them surrounded and penetrated the two towns. In these circumstances, the Board of Directors of the Tennessee Valley Authority determined that the towns were within "the area for which the Corporation [TVA] or its distributors were the primary source of power supply on July 1, 1957," within the meaning of Section 15d of the TVA Act, which permits TVA power to be made available without restriction within the primary area. The following questions are presented:

1. Whether the private utility company had standing to sue to enjoin the distribution of TVA electricity by the towns in competition with the company.

2. Whether the court of appeals erred in ruling that the Board's determination was entitled to no deference and that the courts are to determine *de novo* the boundaries of TVA's primary area.

3. Whether the Board's determination in this case should have been sustained.

STATUTE INVOLVED

The provisions of Sections 10, 11, 12 (48 Stat. 64, as amended, 16 U.S.C. 831i, 831j, 831k) and 15d(a) (73 Stat. 280, as amended 16 U.S.C. 831n-4 (a)) of the Tennessee Valley Authority Act are printed in the Appendix, *infra*, pp. 39-46.

STATEMENT

Tazewell and New Tazewell are two small incorporated towns in Claiborne County, Tennessee (R. 332). They lie a few miles southeast of the point where Kentucky, Virginia and Tennessee come together and between the forks of the reservoir created by TVA's Norris Dam. Since the 1920's, respondent Kentucky Utilities Company (or its predecessors) has maintained a power line extending some 16 miles from the Kentucky border to the Tazewells (R. 328-29; Ex. 38, R. 410, 773). The line provides electric service in these towns and in other small Tennessee communities along the highway between Middlesboro, Kentucky and Tazewell (R. 407, 409). Respondent also has a power line running into a small area in the western part of the county (Mingo Hollow) (R. 575; Ex. 38, R. 410, 773). But it has never extended its service into the less populous areas of Claiborne County (R. 640, 651). Service to most of Claiborne County is provided by two distributors of TVA power—Powell Valley Electric Cooperative ("Powell"), with headquarters at Jonesville, Virginia; and the City of LaFollette, Tennessee ("LaFollette"), located in Campbell County, which adjoins Claiborne County on the west. Powell began to extend electric service to residents of Claiborne County some time prior to 1941, and by 1957 its lines blanketed the eastern half of the county, encircling Tazewell and New Tazewell and extending into both towns (R. 561; Ex. 105, Ex. Vol. I, sheet 2b, R. 649-51). Meanwhile, LaFollette had extended its lines to cover the western half of the county, with the exception of

the uninhabited mountainous areas.[2] By July 1, 1957, the two TVA distributors provided approximately two-thirds of the electric service in the county, whether measured in number of customers, kilowatt-hour sales, or depreciated plant investment (R. 84-85, 441-442).

Powell's rates were much lower than respondent's for any substantial use of electricity. For an electrically heated home, respondent's rates were 2½ times as high as the Powell rates.[3] As a result, property served by Powell had a much higher market value (R. 645). Almost none of the newer homes were built on property that did not have Powell service available,[4] and such property was also unattractive to industry (R. 187, 683). This situation was felt to be retard-

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[2] TVA Exhibit No. 91 (Ex. Vol. I, sheet 1b, R. 552) shows Tazewell, New Tazewell, and the lines and customers of TVA power distributors in Claiborne County as of July 1, 1957 (the operative date for determining the primary area of TVA service). The lines covering the eastern part of the county and completely surrounding the Tazewells are Powell's. Those covering the western portion (except for mountainous areas which are without electric service) are LaFollette's (R. 561). KU Exhibit No. 38 (R. 410, 773) is a copy of TVA Exhibit No. 91 on which respondent has drawn its own service lines. KU Exhibit No. 25 (R. 385-86, 758) is a map of Tazewell and New Tazewell showing the respective service of respondent, and Powell on July 1, 1957, and KU Exhibit No. 24 (Ex. Vol. I, sheet 3b, R. 384) provides similar information as of April 24, 1964.

[3] Comparative rates were as follows (R. 657-58):

KWH	KU	Powell
3800	$75.53	$30.50
4800	$95.53	$38.00

[4] The Mayor of New Tazewell testified that the only modern home he knew of in the area supplied by respondent in New Tazewell had been built by an employee of respondent, while a number of modern homes had been built on land where TVA power was available. Lots with TVA power available sold for about a third more than otherwise identical lots dependent on respondent's power (R. 671-72).

ing the growth of the towns (R. 187, 639, 683), and gave rise to considerable discontent (R. 187, 651-652, 668). The towns decided to seek TVA power, to which they thought they had a special claim because of their proximity to Norris Dam (R. 638, 671).

On February 4, 1960, representatives of the Tazewells and of Middlesboro, Kentucky met with the TVA Board of Directors to inquire whether they could obtain TVA power. They were told that the Tazewells were within the area in which TVA power could be supplied but that Middlesboro, which lies just north of the Kentucky-Tennessee line, was not (R. 311, 576-577; Ex. 98, R. 577-578, 811-812).[5] The Board suggested that, because of their small size, the Tazewells should explore the possibility of obtaining TVA power through Powell (Ex. 98, R. 577-578, 811-812). The towns undertook to make the necessary arrangements. Finally, in the words of the district court:

> [T]he two towns, through their authorized officials, circulated a petition to the citizens of the towns to determine their desires in this matter. These petitions showed a strong sentiment for the acquisition by the towns of their own municipal electric systems. Following the circulation of these petitions, the town councils passed resolutions on October 21, 1963 authorizing the Mayors of the two towns to take the necessary steps to purchase or

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[5] Subsequently, on August 26, 1964, the TVA Board, in response to inquiries from various sources as to the availability of TVA power in other parts of Claiborne County, made a formal determination that all of Claiborne County (including the Tazewells) is within TVA's primary area (Ex. 93, R. 552-553, 795-809).

> build their own municipal systems and to finance the same from revenues to be derived from the systems. They expressed to KU their desire to purchase KU's distribution system in the two towns, but KU did not respond and they decided to build their own systems. They engaged a contractor to build the necessary facilities and to make the connections to the new customers. Thereafter, the two towns arranged with Powell Valley to maintain and operate the systems, do any additional construction work, make electrical connections, and handle the billing of the customers in the name of the two towns. [R. 311-312.]

In October 1963 some residents of the towns who had been receiving electric service from respondent began to receive service from the towns instead, and on November 7, 1963, respondent instituted the present action (R. 2, 312).

The complaint (R. 6-13) alleged that Tazewell and New Tazewell were not within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and that service within the towns to customers not already receiving TVA power was, therefore, in violation of Section 15d of the TVA Act (Appendix, *infra,* pp. 43-46). Federal jurisdiction was predicated upon Section 15d of the TVA Act and the existence of a federal question (28 U.S.C. 1331), and injunctive relief was sought. After trial, the district court dismissed the complaint. While upholding the standing of respondent to sue, it concluded:

> The finding of the Board was made in good faith and supported by substantial evidence.

> The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. [R. 321.]

The court of appeals reversed, Judge Edwards dissenting. It held that the TVA Board is without authority to determine the area for which TVA or its distributors were the primary source of power supply on July 1, 1957 (R. 729). Correlatively, the court held that the Board's determination that the Tazewells were within that area was entitled to no deference, and it then proceeded to make an independent determination that the Tazewells were not within the area (R. 729-732).

ARGUMENT

Introduction and Summary

It may be helpful at the outset to parse the statute that is in issue here—Section 15d of the Tennessee Valley Authority Act, added to the Act in 1959. In pertinent part, it provides as follows:

> Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation

or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

It is evident that Congress envisioned, first, an area in which TVA was the primary but not the sole source of electric power on July 1, 1957. Within this primary area TVA and its distributors are free to supply power

to any customers whether or not they are located within a municipality, and whether or not they have been receiving power from another source. Surrounding the primary area is an area five miles in width, in which TVA power may likewise be supplied to customers who have been receiving power from another source. However, municipalities receiving power from another source on or after July 1, 1957, are excluded from this peripheral area.[6] Outside the primary and peripheral areas TVA power may be made available to customers in areas in which TVA or its distributors had generally established service on July 1, 1957, and to which electric service was not being supplied from another source on the effective date of the amendment.

Whether TVA power may be supplied to consumers in the Tazewells who were receiving electric service from respondent on the effective date of Section 15d thus depends on whether the Tazewells are within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

Before considering this question, it is necessary to decide a threshold issue of jurisdiction: whether a private utility complaining of unauthorized competition by TVA distributors has standing to bring a suit to enjoin such competition. Traditionally, injury from competition has been deemed an insufficient basis for bringing a federal action unless the plaintiff has an exclusive franchise or other privilege to be free from

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[6] Further limitations, not here relevant, are that the peripheral area shall not exceed 2,000 square miles, or include more than 500 square miles within any one State, or include any portion of a State that was not receiving TVA power when Section 15d was enacted.

competition—which respondent here does not claim. Congress can, of course, confer standing in these circumstances if it wishes, but nothing in the text or history of the 1959 amendment suggests an intention to confer a right of action upon private utilities; the absence of any standards to guide a court in delineating the bounds of the primary area strongly indicates that no judicial relief was contemplated.

To be sure, a desire to afford some protection to adjoining utilities appears to have been one of the factors which led Congress to include a territorial limitation. A purpose to protect, however, is not the equivalent of the creation of a private right of action to enforce the protective provision. The distinction is well recognized in the cases. And the absence of a judicial remedy by no means renders the area limitation nugatory, since Congress has effective and continuing supervision over TVA's adherence to its proper area of authority.

On the merits, we begin by invoking the long and firmly established principle that an expert agency's judgment as to the meaning of the statutory terms it administers is entitled to considerable deference. The precept is especially apt where, as here, the statute to be construed is devoid of specific standards, and its construction and application involve considerations within the specialized competence of the agency and are essential to the agency's performance of its statutory function.

We then show that the TVA Board's interpretation of the primary area as embracing the Tazewells was eminently reasonable and should, therefore, have been sustained by the court of appeals whatever the court's

independent view of the statute's meaning. The Tazewells were islands of predominantly private power in an area where TVA was the primary source of power supply on the operative date. The design and legislative history of the area limitation support the view that such enclaves were not excluded from the primary area, and this conclusion conforms to the needs of the communities involved and to the realities of the electrical business.

I. The Tennessee Valley Authority Act Discloses No Purpose to Authorize Private Utility Companies to Bring Suit to Confine the Agency Within the Statutory Limits of Its Power.

At least since the decision of this Court in *Railroad Co.* v. *Ellerman,* 105 U.S. 166, it has been settled doctrine that suit may not be maintained in a federal court to enjoin competition unless the competition invades a legally protected interest. Hence, a suit by a businessman to protect a non-exclusive franchise from competition that was allegedly made possible or assisted by a government official or agency acting unconstitutionally or illegally will not, without more, lie.[7] Re-

[7] *Alabama Power Co.* v. *Ickes,* 302 U.S. 464; *Duke Power Co.* v. *Greenwood Co.,* 302 U.S. 485; *Tennessee Electric Power Co.* v. *TVA,* 306 U.S. 118; *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113; and *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884. See, also, *Rural Electrification Administration* v. *Central Louisiana Electric Co.,* 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815; *Rural Electrification Administration* v. *Northern States Power Co.,* 373 F. 2d 686 (C.A. 8), certiorari denied, 387 U.S. 945; *Pennsylvania R. Co.* v. *Dillon,* 335 F. 2d 292 (C.A. D.C.), certiorari denied *sub nom. American Hawaiian S. S. Co.* v. *Dillon,* 379 U.S. 945; *Pittsburgh Hotels Ass'n, Inc.* v. *Urban Redevelopment Authority,* 309 F. 2d 186 (C.A. 3), certiorari denied *sub nom. Hilton Hotels Corp.* v. *Urban Redevelop-*

spondent here claims no exclusive franchise—no legally protected interested in freedom from competition. And under Tennessee law it is clear that Tazewell and New Tazewell have the right to acquire their own electric systems and to supply power to their citizens in competition with respondent.[8] The situation is thus like that described in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479-480:

> * * * these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.

The Alabama Power Company complained of lawful

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ment Authority, 372 U.S. 916; *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency*, 310 F. 2d 99 (C.A. 7), certiorari denied, 373 U.S. 914; *Berry* v. *Housing and Home Finance Agency*, 340 F. 2d 939 (C.A. 2); *Taft Hotel Corp.* v. *Housing and Home Finance Agency*, 262 F. 2d 307 (C.A. 2), affirming 162 F. Supp. 538 (D. Conn.), certiorari denied, 359 U.S. 967. Cf. *Johnson* v. *Redevelopment Agency*, 317 F. 2d 872 (C.A. 9). Nor will the plaintiff's allegation of a conspiracy involving federal officials do service for a legally protected interest. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 146-147; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 929-930 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. Moreover, the district court found that no conspiracy existed and this finding was not challenged on appeal.

[8] Tenn. Code Ann. §§ 6-1501 to -1537 (1955) (Municipal Electric Plant Law of 1935); Tenn. Code Ann. §§ 6-1301 to -1318 (1955) (Revenue Bond Law); *Keeble* v. *Loudon Utilities*, 370 S.W. 2d 531, 533 (Tenn.); *Knoxville Water Co.* v. *Knoxville*, 200 U.S. 22; *West Tennessee Power & Light Co.* v. *City of Jackson*, 97 F. 2d 979 (C.A. 6).

municipal competition aided by what it claimed were unconstitutional federal loans and grants. Here, respondent complains of lawful municipal competition aided by what it says is illegally provided federal power. Such a complaint cannot be entertained, as this Court stated in *Alabama Power Company, supra,* at 481,

> * * * unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted.

The court below sought to distinguish these authorities on the ground that the territorial limitation in Section 15d was enacted for the benefit of private utilities such as respondent. We do not question Congress' power to confer standing on private utilities based on injury through competition. We do question whether merely because a desire to afford some protection to adjoining private utilities was one [9] of the factors which led Congress to impose a geographical limitation on TVA's authority to supply power, it is deducible that actionable rights were conferred on the utilities to enforce this limitation. At the time of the enactment of the 1959 amendment, the prevailing view of stand-

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[9] The complaint concedes: "There were additional reasons for the foregoing area limitations in the said Act" (R. 9).

ing was that typified by the language of the District of Columbia Circuit in *Kansas City Power & Light Co.* v. *McKay, supra,* n. 7, 225 F. 2d at 931, n. 11, decided some four years previously:

> Appellants contend that they are members of a special class for the benefit and protection of which the statutes in question imposed a duty on the defendant public officers to refrain from acting as they have done. But we find nothing in the statutes which creates any duty to benefit and protect public utility companies. Rather it seems plain that Congress reserved the right to supervise the activities of the agencies involved, including the protection of utility companies. *Without some special provision for judicial review we cannot disregard the long established rule that a utility company, the only interest of which is that it may suffer from the competition of a public power program, cannot enjoin the execution of that program.* [Emphasis added.]

In the face of this established and familiar principle, it would appear that had Congress intended to confer standing upon respondent to enforce the 1959 amendment it would have done so in unmistakable language. Yet, one searches the amendment in vain for any indication of such a purpose. There is no provision for notice of, or hearing upon, the agency's determination that a particular city or locality is within the area of permissible service; no provision for administrative or judicial challenge or intervention; and no refer-

ence to "persons aggrieved," [10] persons "whose interests [may be] adversely affected," [11] "any party in interest," [12] or any of the other statutory phrases commonly included when Congress proposes to grant a right to sue in circumstances where traditional doctrine would deny standing. Compare *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 476-477.

We do not reason merely from the Legislature's failure to authorize suit expressly. The terms of the amendment themselves imply that no grant of a justiciable right to private utilities was intended. No standards are indicated for guiding judicial decision of a case in which it is alleged that TVA has overstepped the bounds. The amendment refers to "the area" for which TVA was the "primary source of power supply" on a given day, but criteria for delineating that area are nowhere set forth. A reviewing court would be left wholly at large. This suggests that no judicial review was contemplated. Moreover, Congress expressly reserved to itself the right, at any future time, to expand the area within which TVA could be a source of power. This reservation seems at odds with the notion that private power companies were granted a

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[10] *E.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a); Section 24(a) of the Utility Holding Company Act, 15 U.S.C. 79x(a); Section 313(b) of the Federal Power Act, 16 U.S.C. 825 l(b); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[11] *E.g.*, Section 701(f)(1) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(f)(1); Section 402(b)(6) of the Federal Communications Act of 1934, 47 U.S.C. 402(b)(6).

[12] Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20); cf. Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1486(a) ("any person disclosing a substantial interest").

judicially protectible interest in being free from competition by TVA or its distributors. Thus, far from presenting a situation calling for departure from the traditional rules of standing, this case invites their full application.

We are confirmed in this view by the legislative history of the 1959 amendment. Nowhere in that history, or in the bills introduced in earlier Congresses, have we found a statement of intention to relieve Congress of its responsibility for overseeing TVA's operations, and to open the doors of the federal courts to the private utilities.[13] See, *e.g.*, H. Rep. No. 271, 86th Cong., 1st Sess.; S. Rep. No. 470, 86th Cong., 1st Sess.[14]

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[13] It was not suggested that even the rigid Vinson amendment (see p. 30, *infra*), which Congress rejected, would have conferred standing on the private utilities to sue TVA. Thus, in his statement to both committees, Mr. J. J. McDonough, President of the Georgia Power Co., stated his belief that Congress was the appropriate agency to confine TVA within proper bounds:

> There should be no objections, therefore, to the proposal made today by your colleague, the Honorable Carl Vinson, proposing to establish an effective, plainly stated boundary limitation preserving existing service areas. My plea is that this should be done by this committee and that control and supervision of the whole problem be clearly maintained under the Congress. In the event TVA should some time in the future determine that it would be in the public interest for it to expand its service area, then it would be free to come to the Congress for permission to do so.
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> *The Congress and its committees have long been the forum available for the adjudication of differences between agencies of our Government and its citizens. We do not want to lose the opportunity to be effectively heard* [emphasis added].

Hearings before the House Committee on Public Works on H.R. 3460 and H.R. 3461 to Amend the Tennessee Valley Authority Act, 86th Cong., 1st Sess., p. 149; Senate Hearings before a Subcommittee of the Committee on Public Works on S. 931 and H.R. 3460, bills to amend the Tennessee Valley Authority Act of 1933, 86th Cong., 1st Sess., p. 223.

[14] The Senate Report does, to be sure, remark in passing that some proposed statutory language had been rejected in part because its

We are strengthened in our conclusion by the uniform course of decision in the courts of appeals that, merely because an act of Congress affords protection to a particular class of persons, the members of that class have no right of action, in the absence of a showing that Congress intended to confer such a right. One line of cases, decided by the District of Columbia and Fifth Circuits, holds that private power companies may not enjoin loans by the Rural Electrification Administration to rural electric cooperatives that would permit the cooperatives to generate and transmit power in competition with the private companies. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884; *Iowa-Illinois Gas & Elec. Co.* v. *Benson,* 247 F. 2d 22 (C.A. D.C.), certiorari denied, 356 U.S. 949; *Rural Electrification Administration* v. *Central Louisiana Electric Co.,* 354 F.2d 859 (C.A. 5), certiorari denied, 385 U.S. 815. See, also, *Rural Electrification Administration* v. *Northern States Power Co.,* 373 F.2d 686 (C.A. 8), certiorari denied, 387 U.S. 945. In each of these cases, the private power company relied on the provision of Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. 904, prohibiting the distribution of power to areas already obtaining central station power; and argued that the provision, being designed to protect them from competition from REA-financed cooperatives, conferred upon them substantive rights enforceable in the federal courts. In each case, the argument was rejected.

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ambiguity might engender litigation (p. 9). We do not view this casual reference to litigation as evincing a purpose to confer actionable rights on private utilities.

The rationale of the Ninth Circuit's decision in *Johnson* v. *Redevelopment Agency,* 317 F.2d 872, is similar. Residents of an urban redevelopment area sought to enjoin the execution of the renewal project on the ground that the redevelopment agency had failed to comply with the provision of Section 105(c) of the Housing Act of 1949, as amended, 42 U.S.C. 1455(c). That provision requires, as a condition to the extension of redevelopment grants and loans by the federal government, the formulation of a feasible plan for the relocation of families who would be displaced from the urban renewal area. Its purpose was stated by the Senate Committee on Banking and Currency, S. Rep. No. 84, Part 2, 81st Cong., 1st Sess., p. 6, as follows:

> Obviously, slum clearance projects cannot go forward without some difficulties for the families to be displaced. Provisions are therefore included to afford reasonable protection for such families.

Concluding that the plaintiffs lacked standing to enforce Section 105(c)—notwithstanding that they were intended beneficiaries of the relocation-plan requirement—the Ninth Circuit pointed out (317 F.2d at 874):

> * * * The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on redevelopment agencies by the United States, although those suing would benefit from such enforcement. *Gart* v. *Cole,* 263 F.2d 244 (2d Cir. 1959); *Allied-City Wide, Inc.* v. *Cole* 97 U.S. App. D.C. 277, 230 F.2d 827 (1956); cf. *Pittsburgh Hotels Association* v.

Urban Redevelopment Authority of Pittsburgh, 309 F.2d 186 (3rd Cir., 1962).

Also relevant here is *Berry* v. *Housing and Home Finance Agency,* 340 F. 2d 939 (C.A. 2). In *Taft Hotel Corp.* v. *Housing and Home Finance Agency,* 262 F. 2d 307 (C.A. 2), the complaint of a hotel owner attacking the approval by the Federal Housing and Home Finance Agency of an urban renewal plan which included a new hotel, on the ground that there was no need for additional hotel facilities in the city, had been dismissed for want of standing. The following year Congress had amended the Housing Act—apparently at the behest of the American Hotel Association [15]—to provide that no new construction of hotels or other housing for transients was to be included in an urban renewal plan unless the local authorities first made "a competent independent analysis" of the existing transient housing facilities and, as a result of the survey, the FHA Administrator determined that there was a need for additional units of such housing. Berry, the owner of a hotel in Utica, New York, brought suit to enjoin a Utica urban renewal project that included new hotel facilities, charging that no competent inde-

[15] See Hearings on the Housing Act of 1959, Senate Committee on Banking and Currency, 86th Cong., 1st Sess., pp. 755-756 (Statement of Arthur J. Packard, American Hotel Association); Hearings on Housing Act of 1959, before the Subcommittee on Housing of the House Committee on Banking and Currency, 86th Cong., 1st Sess., pp. 705-707 (same). See, also, Hearings on Housing Act of 1955, before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., pp. 393-394 (Testimony of Arthur J. Packard); Hearings on Housing Amendments of 1955, House Committee on Banking and Currency, 84th Cong., 1st Sess., pp. 452-453 (same).

pendent analysis of the existing supply of transient housing had been conducted. He contended that since the statutory provision requiring such an analysis had been added to the Housing Act in the wake of the *Taft Hotel* decision and was obviously designed for the benefit of owners of existing hotel facilities, a legislative purpose to permit hotel owners to complain in judicial proceedings of violations of the provision could be inferred.

The Second Circuit—affirming the district court's dismissal of the complaint for lack of standing—rejected this contention. It found no indication of any purpose of Congress to permit hotel owners to complain of "[e]conomic loss stemming from lawful competition, even though made possible by federal aid." It noted that "[t]here are instances where an individual has no legal remedy even though a federal law affecting his interests may have been violated," and that, despite the absence of judicial control, Section 410(g) was an effective provision to ensure that federal funds were not expended improperly.

This case is similar. By the TVA amendment, Congress doubtless intended to give a measure of protection from federally assisted competition to private utilities; the Housing Act amendment had precisely the same purpose vis-à-vis hotel owners such as Berry. As the Second Circuit explained, the critical inquiry is whether Congress intended to bestow *legally enforceable* rights on the class it was protecting.

The Second Circuit's observation that a statutory limitation upon a program of federal expenditures (like urban renewal) is not nugatory merely because judicial review is unavailable is especially apt here in

view of the Sixth Circuit's comment that "[i]t would be useless for Congress to include distinct limitations upon the expansion plans of such public corporations as TVA if there was no way to force them to keep within such limitations." 375 F.2d at 417. In fact, Congress has a continuing control over TVA's operations that is wholly adequate, practically as well as theoretically, to check unlawful expansion. While TVA has authority to use the proceeds of bonds in connection with its power program, most of its programs are financed by appropriations and TVA must come before the appropriation committees each year, at which time the committees review TVA's total operations. TVA must also file an annual report with the Congress each year and its operations are reviewed by the General Accounting Office, which likewise reports to the Congress annually. TVA must come before the legislative committees periodically for increases in its borrowing authority and, of course, the Congress is the natural place in which complaints against TVA's operations are lodged. Congress has complete control and can modify or repeal the TVA Act at any time.

The courts have recognized, in circumstances similar to those here, that congressional supervision is an effective—and often the exclusive—means of enforcing statutory limitations on the authority of federal agencies. See *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F.2d 859, 865 (C.A. 5), certiorari denied, 385 U.S. 815; *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F.2d 686, 700-701 (C.A. 8), certiorari denied, 387 U.S. 945; *Kansas City Power & Light Co.* v. *McKay*, 225 F.2d

924, 931 (C.A.D.C.), certiorari denied, 350 U.S. 884. There is no imperative need to imply a judicial remedy as well.[16]

II. On the Merits, the TVA Board's Determination That the Tazewell Communities Were Within the Area for Which TVA Was the Primary Source of Power Supply on July 1, 1957, Was Reasonable and Should Be Sustained.

A. *The Determination of the TVA Board That a Particular Community Is Within the Primary Area Should be Accorded Substantial Deference, and Upset By a Reviewing Court Only If Unreasonable.*

The initial premise of our argument on the merits is that an agency's area of special competence is not fact-finding alone; the expert agency chosen to administer a statute also has considerable latitude in giving con-

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[16] In holding that respondent had standing in the present case, the Sixth Circuit cited its decision in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830, which had held that a State bank possessing a franchise exclusive as against other branch banks had standing to enjoin the issuance of a certificate by the Comptroller of the Currency authorizing a national bank to establish a new branch in competition with the State bank. See, also, *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252. The branch-banking cases have been distinguished by the Fifth Circuit from cases like the instant one. In *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F.2d 859, 864 (C.A. 5), certiorari denied, 385 U.S. 815, the Fifth Circuit pointed out that both *Wayne Oakland, supra*, and *Whitney Nat. Bank* v. *Bank of New Orleans*, 323 F. 2d 290 (C.A. D.C.), reversed, 379 U.S. 411, had been brought by banks enjoying a State-conferred privilege to operate free from the competition of branch banks not authorized by the State, whereas the power company had no such privilege.

crete meaning and content to the statutory terms. Recently, this Court, in upholding the Securities and Exchange Commission's construction of the term "loss of substantial economies" as it appears in the Public Utility Holding Company Act, spoke of "the permissible range given to those who are charged with the task of giving an intricate statutory scheme practical sense and application." *Securities and Exchange Commission* v. *New England Electric,* 384 U.S. 176, 185. See, also, *Federal Trade Commission* v. *Brown Shoe Co.,* 384 U.S. 316, 321; *Power Reactor Co.* v. *Electricians,* 367 U.S. 396, 408.

The rule, however, is not one of recent origin. As long ago as 1904, this Court stated in *Bates & Guild Co.* v. *Payne,* 194 U.S. 106, 109-110 (emphasis added):

> The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, *or of law alone,* his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Nor has respondent here. The Sixth Circuit also cited *Stark* v. *Wickard,* 321 U.S. 288, and *Leedom* v. *Kyne,* 358 U.S. 184, but those cases, unlike the one at bar, involved interests which have traditionally been considered judicially protectible. In *Wickard,* the agency ruling deprived the plaintiffs of money to which they claimed they were entitled; in *Leedom,* it infringed the plaintiffs' right of collective bargaining.

Later, in a case arising under the Bituminous Coal Act, the Court declared (*Gray* v. *Powell*, 314 U.S. 402, 413):

> Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.

Similarly, in *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131, the Court held that the agency's determination that specified persons were "employees" within the meaning of the National Labor Relations Act was to be accepted if it had "a reasonable basis in law"; for "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." Again, in *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153, the Court explained:

> To sustain the Commission's application of this statutory term ["active progress" of a labor dispute], we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

See, also, *United States* v. *Drum*, 368 U.S. 370; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309; *Labor Board* v. *Coca-Cola Bot. Co.*, 350 U.S. 264; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125.

Moreover, the courts have uniformly declined to exercise supervisory control over the performance of discretionary functions by executive officers,[17] and the construction by executive officers of statutes under which they act, when there is more than one possible meaning, has been viewed as itself an exercise of executive discretion.[18] As this Court stated in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318, "where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. See *Work* v. *Rives*, 267 U.S. 175, 183; *Wilbur* v. *Kadrie*, 281 U.S. 206, 219; *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U.S. 50, 62-63."

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[17] See, *e.g.*, *United States* v. *Wright*, 11 Wall. 648, 650; *Heath* v. *Wallace*, 138 U.S. 573, 585; *Friedman* v. *Schwellenbach*, 159 F. 2d 22, 25 (D.C. Cir.), certiorari denied, 330 U.S. 838. The three cases cited by the court of appeals are readily distinguishable. In *Stark* v. *Wickard*, 321 U.S. 288, this Court held only that petitioners had standing to challenge an order of the Secretary of Agriculture under the Agricultural Marketing Agreement Act; it did not pass on the weight to be given the Secretary's findings. In *Peters* v. *Hobby*, 349 U.S. 331, the Court held that the Loyalty Review Board had acted without authority in considering, on its own motion, the decision of an agency board clearing the employee concerned; the correctness of its action in reversing that decision was not involved. *Leedom* v. *Kyne*, 358 U.S. 184, involved an admitted violation of a clear and unambiguous statute.

[18] This principle has most often been applied in mandamus cases. *E.g.*, *Decatur* v. *Paulding*, 14 Pet. 497; *United States ex rel. Dunlap* v. *Black*, 128 U.S. 40; *United States ex rel. Hall* v. *Payne*, 254 U.S. 343; *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206. But it is equally applicable where the remedy sought is an injunction (*Gaines* v. *Thompson*, 7 Wall. 347; *Brunswick* v. *Elliott*, 103 F. 2d 746 (C.A. D.C.); *Dudley* v. *James*, 83 Fed. 345 (*C.C.D. Ky.*)) or a declaratory judgment (*Doehler Metal Furniture Co.* v. *Warren*, 129 F. 2d 43 (C.A. D.C.), certiorari denied, 317 U.S. 663; *United States ex rel. Jordan* v. *Ickes*, 143 F. 2d 152 (C.A. D.C.), certiorari denied, 323 U.S. 759).

We do not, of course, argue that the degree of deference to be accorded an agency's construction is uniform, regardless of circumstances. As the cited decisions indicate, it makes a significant difference whether the provision in question is cast in very broad and general terms, allowing great latitude for choice and discretion in its specific application, or whether the meaning is readily ascertainable from the statutory context; whether construction involves a knowledge of technical matters on which the agency is presumed to have greater competence than the courts; and whether the determination is not merely peripheral to the agency's responsibilities but an essential predicate of its exercise of the powers delegated to it by the Legislature. By any of these tests, the present case is one where it is appropriate for the courts to confine their reviewing function to the ascertainment of whether the agency's interpretation is a reasonable one.

In question here is the delineation of "the area" for which TVA (or its distributors) constituted on July 1, 1957, "the primary source of power supply" within which TVA may furnish power without limitation or exception. The area is not further defined in the Act. The range of plausible interpretations is obviously great. Geographical, economic and engineering considerations are involved. On the relevant date, TVA supplied more than half of the total electric power consumed in the State of Kentucky. Is all of Kentucky, therefore, within the TVA primary area? Or should the area be determined, rather, on a county-by-county, or even a municipality-by-municipality, basis? Must political subdivisions be used at all, or should the pri-

mary area be delineated in accordance with historic marketing patterns in the electric industry? May still other factors be relevant?

As these questions illustrate, the disputed statutory term is susceptible of a variety of interpretations. Congress painted with a broad brush indeed. By leaving the meaning of the statutory concept undefined, it shifted to the administering agency—TVA—the task of precise interpretation and application to concrete cases. It knew, of course, that the agency would be obliged in every case to make a threshold determination fixing the primary area in relation to the facts at hand, for the TVA Act affirmatively requires that TVA power be made available to public bodies and cooperatives within the permissible area (§§ 10, 12). Given a request for TVA power, the TVA Board must, therefore, determine whether the furnishing of such power would make TVA a source of power supply outside the permissible area—which in turn necessitates a delineation of that area.

The court below completely overlooked this fact. It held that the TVA Board is without authority to make any determination as to what is included in the primary area, stating (R. 729, 734):

> But, TVA argues, the 1959 Act must be read as committing to its Board of Directors authority to determine "the area" in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's Board such authority. * * *

> We * * * do not find that Congress, directly or indirectly, left it to TVA to determine "the area for which [it was] the primary source of power supply on July 1, 1957".[19]

The view thus expressed by the court is obviously in error; without first making a determination as to the primary area and its periphery, the Board could neither grant nor refuse a request by a preference customer for power in a doubtful case.

In addition, it is evident that to delineate the area within which TVA power shall be available requires—in the absence of specific statutory standards—a judgment informed by familiarity with local conditions in the Tennessee Valley region and by knowledge and experience of the economics and technology of the electric power industry. Determining the appropriate area in which to confine distribution by a vast power complex is surely no less exacting a judgment for experts than, for example, determining what employment relationships are subject to the National Labor Relations Act. Assuming, *arguendo*, that the judgment required by Sec-

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[19] Correlatively, the court below sought to distinguish the cases cited *supra*, pp. 23-25, on the ground that "they involved the responsibility and right of executive and administrative agencies to make determinations essential to the exercise of granted power" (375 F. 2d at 415, R. 734-735). But, as noted in the text above, that is precisely what is involved here. The determination is essential to the exercise of the power (and duty) to dispose of electric power to preference customers. The court also emphasized that Section 15d speaks in terms of restraint. Actually, it constitutes a grant of unrestricted authority to dispose of electric power within the primary area and a limited grant of authority to dispose of electric power outside the periphery of the primary area. Surely the weight to be given to the TVA Board's determination should not turn on whether limitations on a grant of power are couched in negative or affirmative language. Cf. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125.

tion 15d was intended to be justiciable at all (but see *supra*, pp. 11-22), we submit that the role of the courts is, at most, a limited one; that the TVA Board's discretion to interpret and apply the primary-area concept is broad; and that the court below erred in according the agency's views no deference and substituting its own interpretation without regard to whether that of the agency was reasonable.

B. *The Determination of the TVA Board That the Tazewells Were Within the Primary Area Was Reasonable.*

Tested by the standard of the governing cases—whether the agency's interpretation was a reasonable one—the ruling of the TVA Board that the Tazewell communities were within the primary area of TVA power was, we submit, beyond the power of the reviewing court to disturb. It was eminently reasonable, conforming both to the overall purposes of Congress and to the realities of electric power supply.

The parts of the towns which received their power supply from respondent represented enclaves of private power, wholly surrounded by the lines and services of TVA distributors; and within and around the towns respondent's lines and those of Powell were interlaced. In our view, such pockets of private power may quite reasonably be viewed as within TVA's primary area. While a municipality receiving power from a private utility is barred by the Act from receiving TVA power if the municipality is within the five-mile peripheral area which surrounds the primary area, there is no such limitation upon service within the primary area itself.

Thus, TVA power may be furnished consumers in a town within the primary area, albeit, as in the case of the Tazewells, most of the town's residents previously received power from a private company.

Congress specifically rejected a proposal that would have confined TVA power to the area actually supplied with such power on the operative date, and in so doing made perfectly clear that TVA should be free to supply power in the very circumstances presented in this case. As passed by the House, H.R. 3460 contained an amendment proposed by Representative Vinson providing that TVA facilities should not be used for the sale or delivery of power "for use outside the service area of the Corporation as it existed on July 1, 1957." The Senate Public Works Committee undertook to work out an acceptable compromise between the liberal provisions of the original Senate bill (S. 1869, 85th Cong.)[20] and the stringent limitation contained in the House bill. As reported by the Senate committee, the bill prohibited TVA from entering into contracts which would (a) make TVA a source of power supply for any city, not already served by TVA, having a population in excess of 5,000 (10,000 if it owned its own distribution system); or (b) increase by more than 2½ percent or 2,000 square miles "the area for which the Corporation was the primary source of power supply on July 1, 1957" (S. Rep. No. 470, 86th Cong., 1st Sess., pp. 37-38). The Senate committee rejected the term "service area" in

[20] That bill would have limited TVA service to counties lying wholly or partly within the Tennessee River drainage basin or the service area in which TVA power was being used on July 1, 1957, together with additional areas extending not more than five miles beyond the boundaries of such counties.

the House bill as unduly rigid and ill-suited to the TVA situation. It explained its substitute language as follows (*id.*, p. 8):

> The committee recognizes the problems inherent in an attempt to establish a rigid boundary for limitation of power service.
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> * * * * * *
>
> The committee believed it desirable to authorize minor adjustments in area, to permit elasticity and adjustment in an attempt to eliminate certain problems, and to obviate the necessity of coming back to Congress for each slight adjustment or change, as by extension of lines by a distributor of TVA power. The proposed amendment would permit an increase of the lesser of: (a) 2½ percent of the area for which TVA was the *chief or principal supplier* of power on July 1, 1957, or, (b) 2,000 square miles. [Emphasis added.]

The committee thus made clear its understanding that the area for which TVA was the "primary source of power supply on July 1, 1957" was not limited to the area in which it was the sole supplier of electricity on that date and its intention to leave TVA with sufficient flexibility to permit common-sense adjustments to be made. It stated, further (*id.*, p. 9):

> The committee believes that this provision would permit minor adjustments within, and around the periphery of, the TVA area * * *. Within the general area receiving TVA power there are small

> areas served by private power entirely surrounded by the lines of TVA distributors. There are also many areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced.

This was an exact description of the situation which exists in the Tazewells. If the committee intended to permit "adjustments" in the "small areas served by private power entirely surrounded by the lines of TVA distributors" and in the "areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced," it must have intended to permit TVA power to be made available in those areas to consumers receiving power from another source.

Senator Randolph made this clear in his supplemental views. He took issue with the committee version of the bill solely because it did not require that the 2,000-square-mile area of maximum permissible expansion be contiguous to the primary area (*id.*, pp. 55-56):

> The permitted expansion of TVA is not required to be in territory contiguous to the area now served. Hence, TVA transmission lines could be extended anywhere in the peripheral States now receiving service from TVA. * * *
>
> . . . . .
>
> Inasmuch as the expansion which would be authorized by the Senate committee's recommended amendment is not required to be in areas contiguous to the present TVA territory, such expansion

> could penetrate the entire service area of any utility in any one of the authorized States.

He then made this significant observation (*id.*, p. 56):

> Of course, consistent with this view TVA should be encouraged to serve any "islands" which now exist within its geographical operating area as it existed on July 1, 1957.

The "islands" he was referring to were, of course, the "small areas served by private power entirely surrounded by the lines of TVA distributors" mentioned in the committee report.

Consistently with these views, Senator Randolph, together with Senator Talmadge, offered on the Senate floor an amendment which, with some immaterial changes, was adopted by the Senate and accepted by the House. The amendment retained the basic concept of the Senate committee—an area for which TVA was "the primary source of power supply on July 1, 1957" [21]

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[21] Senator Kerr, Chairman of the Senate committee and Senate floor manager for the bill, sought and obtained unanimous consent that the Randolph-Talmadge amendment be treated as a committee amendment, saying (105 Cong. Rec. 13048):

> * * * in my judgment the amendment does what the committee sought sincerely to do * * *.

Obviously, it was his view, to which no one objected, that the amendment was consistent with the Committee's rejection of the "service area" concept and its desire to permit elasticity and adjustment within and around the primary area. Representative Davis, the House floor manager for the bill, explained the bill passed by the Senate as follows (105 Cong. Rec. 14114):

> As a substitute the Senate bill, in effect, draws a line around the periphery of the area for which either TVA or its distributors were the primary source of power supply on July 1, 1957. It permits additional service within that area * * *.

—while confining the peripheral area of 2½ percent or 2,000 square miles within five miles of the boundary of the primary area.

There is further evidence that Congress contemplated that the Tazewells would be within the primary area of TVA. Area limitations were considered in three successive Congresses before Section 15d was enacted and in each the Senate and House Public Works committees had before them maps showing the approximate outline of the area supplied with TVA power.[22] On these maps, the Tazewells are shown to be within the primary area supplied by TVA. It is true that these maps are "rough approximations," as stated by the court below; and we do not urge that they delineate the exact periphery of the primary area. But they do show, in general, what Congress deemed included within that area. The area that is shown as the TVA area on these exhibits comprises approximately 80,000 square miles and this was the basis for deriving the 2,000-mile figure in the provision that the peripheral area may contain 2,000 square miles or 2½ percent of the primary area, whichever is the lesser. Respondent itself presented a map to the House committee in the 86th Congress (TVA Exhibit No. 92) showing the area involved in this litigation as within the "present TVA service area" (R. 573-74; Ex. Vol. I, sheet 8b, R. 552).[23]

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[22] TVA Exhibit No. 94 (Ex. Vol. I, sheet 5b, 569-71) was before the Senate committee in the 84th Congress; TVA Exhibit No. 95 (Ex. Vol. I, sheet 6b, R. 571-72) was before the House committee in the 85th Congress; TVA Exhibit No. 96 (Ex. Vol. I, sheet 7b, R. 572) was before the House committee in the 86th Congress.

[23] It also presented KU Exhibit No. 100 (Ex. Vol. I, sheet 9b, R. 586-87), a map showing that respondent also had service within Claiborne County.

Nor is it irrelevant to the delineation of the TVA boundary as including the Tazewells to consider the need of the residents and industries of the communities themselves for the more economical power available from the TVA distributor, and the fact that in concentrating upon the towns, and declining to serve most of the surrounding rural areas, respondent was apparently following a deliberate policy of skimming off the most lucrative power business in the area and leaving the less profitable rural business to TVA distributors. Surely it was not in the mind of Congress to perpetuate a situation where the development of a municipality is stultified owing to the chaotic condition of power supply and rates which now prevails in the Tazewells.

These considerations are persuasive of the soundness of the TVA Board's application of the Act in this instance. Perhaps, if the court below were free to consider the question wholly by its own lights, with no regard for the responsible agency's view, it could properly have adopted a contrary view—although we think not. But the judgment, as we have urged, was not one initially committed to the court. Its role (if there is any room for judicial review) is to review the reasonableness of the Board's determination; and it is plain, we think, that the Board's interpretation was, at the least, a reasonable application of a statute that is devoid of concrete standards.

It remains only to note that the court of appeals' independent construction of Section 15d rests on a clear misunderstanding of the basic facts and law. The court held that the Tazewells were not islands of predominantly private power because they were connected

by a single line to respondent's primary service area located farther to the north. But the Tazewells are typical of the "islands" of private power referred to by the Senate committee and by Senator Randolph. The normal source of power supply for such "islands" is, of course, transmitted power; that is how the utility business operates.

Furthermore, the court below seems not to have understood that Congress rejected the service-area concept embodied in the Vinson amendment in favor of the very different primary-area concept. Thus the court erroneously stated (375 F. 2d at 411-412, R. 727):

> * * * Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.

Starting from the premise that "primary area" and "service area" mean the same thing, the court proceeded as though the problem were one of delineating the respective service areas of neighboring utilities. Instead of determining what TVA's primary area was, it sought to determine the boundaries of respondent's service area. Its reasoning was: on July 1, 1957, the Tazewells were supplied principally by respondent and therefore were within respondent's service area; if the Tazewells were within respondent's service area they could not be within the area for which TVA was the primary source of power supply. This is a *non sequitur*. Congress rejected the proposal of the Vinson amendment to confine TVA power to the area actually served

by it on the operative date. It substituted the concept that TVA power may be supplied anywhere within the area for which TVA was the primary—not exclusive—source of power supply. Obviously, that area was intended to be broader than the area actually served by it and its distributors on July 1, 1957.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss respondent's complaint.

Respectfully submitted.

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APPENDIX

TENNESSEE VALLEY AUTHORITY ACT

Section 10, 11, 12, 15d(a), 48 Stat. 64 *et seq.*, as amended and added, 16 U.S.C. §§ 831i, 831j, 831k, 831n—4(a)

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further,*

That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: *Provided further,* That the board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the board: *Provided further,* That in order to supply farms and small villages with electric power directly as contemplated by this section, the board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further,* That the terms "States," "counties," and "municipalities" as used in this Act shall be construed to include the public agencies of any of them unless the context requires a different construction . [48 Stat. 64, as amended, 16 U.S.C. 831i.]

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit

of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act. [48 Stat. 64-65, 16 U.S.C. 831j.]

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided,* That if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree

to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further,* That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further,* That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time

as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is an excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further,* That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief. [48 Stat. 65-66, 16 U.S.C. 831k.]

SEC. 15d. (a) The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $750,000,000 [1] outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this Act, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other purposes incidental thereto. Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional

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[1 In 1966, increased to $1,750,000,000 by P.L. 89-537.]

area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from

entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: *Provided further,* That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this Act shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Notwithstanding the provisions of section 26 of this Act or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such

manner as it may deem necessary or desirable. The Corporation is authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this Act, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law. [As added, 73 Stat. 280, and amended, 73 Stat. 338, 16 U.S.C. 831n-4(a).]

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